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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1016~~ 711

M. B. BUFORD, J. W. TAYLOR, CHARLES CROCKER AND GEORGE CROCKER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE PROMONTORY STOCK RANCH COMPANY, APPELLANTS.

vs.

JOHN S. HOUTZ, HENRY CONANT, AND EDWARD CONANT, PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HOUTZ & CONANT; ISRAEL HUNSACKER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED AUGUST 13, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1056.

M. B. BUFORD, J. W. TAYLOR, CHARLES CROCKER AND GEORGE CROCKER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE PROMONTORY STOCK RANCH COMPANY, APPELLANTS.

vs.

JOHN S. HOUTZ, HENRY CONANT, AND EDWARD CONANT, PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HOUTZ & CONANT; ISRAEL HUNSACKER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 19, 1888.

all of sections 5, 7, 9, 15, 17, 19, 21, 27, 29, 31, 33, and 35 in township 7 north, range 5 west; all of section 3 in township 6 north, range 5 west; all of sections 5, 7, 17, 19, 21, 27, 29, 31, and 33 in township 8 north, range 5 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 29, and 31 in township 9 north, range 5 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, and 17 in township 10 north, range 5 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19,
3 21, 23, 25, 27, 29, 31, 33, and 35 in township 11 north, range 5 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 12 north, range 5 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 13 north, range 5 west; all of sections 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 14 north, range 5 west; all odd sections in fractional township 7 north, range 6 west; all odd sections in fractional township 8 north, range 6 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 9 north, range 6 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 10 north, range 6 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 11 north, range 6 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 12 north, range 6 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 13 north, range 6 west; all of sections 7, 9, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 14 north, range 6 west; all odd-numbered sections in fractional township 8 north, range 7 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 9 north, range 7 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 10 north, range 7 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 11 north, range 7 west; all of sections 1, 3, 5,
4 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 12 north, range 7 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 13 north, range 7 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 14 north, range 7 west; all of sections 29, 31, 33, and 35 in township 15 north, range 7 west; all of the odd-numbered sections in fractional township 9 north, range 8 west; all the odd-numbered sections in fractional township 10 north, range 8 west; all of the odd-numbered sections in fractional township 11 north, range 8 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 12 north, range 8 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 13 north, range 8 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 14 north, range 8 west; all odd-numbered sections in fractional township 15 north, range 8 west; all of sections 1, 3, 5, 7, and 17 in township 11 north, range 9 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 12 north, range 9 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 13 north, range 9 west; all

of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 14 north, range 9 west; all odd-numbered sections in fractional township 15 north, range 9 west; all odd-numbered sections in fractional township 11 north, range 10 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 12 north, range 10 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 13 north, range 10 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 in township 14 north, range 10 west; and also all of the odd-numbered sections in fractional township 15 north, range 10 west, Salt Lake base and meridian.

That plaintiffs derived title to all said odd-numbered sections by conveyances from the Central Pacific Railroad Company, a corporation, and the successor in interest and grantee of the Central Pacific Railroad Company of California, to which last-named corporation all of said lands were granted by the Congress of the United States.

The said lands above described comprise in all more than three hundred and fifty thousand (350,000) acres, and extend over an area of forty miles in a northerly and a southerly direction, by about thirty-six miles in an easterly and westerly direction. That said lands are very valuable for the pasturage and grazing of stock and are of little or no value for any other purpose, and were acquired and are now held by plaintiffs for the purposes aforesaid solely. That owing to the character of said lands and the scarcity of water and the aridity of the climate where said lands are situated they can never be subjected to any beneficial use other than the grazing of stock. That said plaintiffs own and are possessed of a large number of horned cattle, to wit, more than 20,000 head, of great value, to wit, of the value of $100,000, and are engaged in the sole business of stock-raising. That said plaintiffs now have and for a long
6 time last past have had all said cattle running and grazing upon said lands. That said plaintiffs have no other lands upon which they can graze or pasture said cattle or any part or portion thereof, nor have plaintiffs any means whatever whereby they can keep or maintain said cattle or any part or portion thereof except by pasturing them upon these said lands, and that said lands are of no value to plaintiffs except for the purposes of pasturage for said cattle. That all the even-numbered sections in each and all of the townships and fractional townships above mentioned belong to and are a part of the unoccupied public domain of the United States. That said defendants have not, nor has either of them, any right, title, or interest or possession or right of possession of or to any of the lands embraced within any of the townships or fractional townships above mentioned, nor have they nor has either of them ever had any right, title, or interest or possession of or right of possession to any of the land embraced within any of said townships or fractional townships.

That none of the lands included within any of said townships or fractional townships are fenced or enclosed except small portions of

said lands of said plaintiffs, which said plaintiffs have heretofore enclosed with fences for use as corrals within which to gather, from time to time, the said cattle of plaintiffs in order to brand the young thereof.

That it is impossible for plaintiffs to fence and enclose their said lands without enclosing large portions of the said lands of the United States lying within the exterior boundaries of plaintiffs' lands;

7 and plaintiffs further allege that they cannot fence and enclose their said lands without rendering large and valuable portions thereof of little or no value for purposes of pasturage, because the cattle of plaintiffs running thereon would thereby be shut off and prevented from obtaining necessary water, which only rises and flows in isolated subdivisions of said lands, and the sources of water supply are long distances apart.

That said defendants, Houtz & Conant, now own and for a long time last past have owned a large number, to wit, 15,000, head of sheep, and each of the other defendants to this action is now and for a long time last past has been the owner of a large band or herd of sheep; that the least number of sheep owned by any one of said defendants exceeds, as plaintiffs are informed and believe, 5,000 head; and plaintiffs further allege that they are informed and believe, and therefore charge the fact to be, that the aggregate number of sheep so owned by said defendants, severally, exceeds 200,000 head.

Plaintiffs further allege and show to the court that the United States official survey has been extended over all the lands embraced within all the townships and fractional townships aforesaid. Plaintiffs further allege that there are seven convenient, well-known, well-defined, and regularly traveled highways over the lands aforesaid, four of which run in a northerly and southerly direction and three in an easterly and westerly direction, entirely across the lands embraced within all the aforesaid townships and fractional

8 townships; yet, notwithstanding the facts aforesaid, plaintiffs allege that each of said defendants claims and asserts that he has the lawful right and is entitled to drive all sheep owned by him over, across, and upon any and all of said lands of these plaintiffs, and to graze and pasture the said sheep thereon wherever and whenever he may wish or desire so to do; that all said defendants, respectively, rely upon and set up a common, though not a joint, pretended right as the foundation of the said asserted right of each so to drive, graze, and pasture his sheep thereon, and each of said defendants bases his said pretended and asserted right so to drive, graze, and pasture his sheep on said lands of plaintiffs upon precisely the same state of facts as that relied upon by each of the other of said defendants in the assertion of his said asserted and pretended right so to do, and not upon any other or different fact or state of facts—that is to say, each of said defendants claims that, all the even-numbered sections in each of said townships and fractional townships being, as aforesaid, unoccupied public domain of the United States, he has an implied license from the Government of the United States to drive, graze, and pasture his sheep thereon,

and that he cannot so drive, graze, and pasture his sheep upon said Government lands without having them run, graze, and pasture upon said lands of plaintiffs, and therefore each of said defendants claims and asserts that he is entitled to have his said sheep run, graze, and pasture upon said lands of plaintiffs as aforesaid.

That during the year last past and while said plaintiffs
9 were so the owners, in possession, and entitled to the possession of said lands as aforesaid, each of said defendants in pursuance of such claimed and asserted right did repeatedly drive large bands and herds of sheep over, upon, and across the said lands of these plaintiffs and graze and pasture the same thereon to the great injury and damage of these plaintiffs.

That said defendants and each of them, in pursuance of such claimed and asserted right so to do, threatens and is about to, and unless restrained by the order of this court will, drive large herds of sheep over, upon, and across said plaintiffs' said lands and graze and pasture the same thereon whenever and wherever they so desire.

That sheep in pasturing on lands crop the natural grasses and herbage thereon growing close to the ground, leaving the same utterly bare and without vegetation, and with their feet cut and bruise the roots of said grasses and herbage under the surface and in great measure destroy the same, so that in a dry and arid climate, as that of Utah, it requires years of non-use for lands so pastured to be restored; that the droppings of sheep on lands are so offensive to horned cattle that they will not range nor feed on lands which have been pastured over by sheep, but unless restrained by herders or inclosures will travel and range away from said lands to distant places, and in moving away will separate and scatter in small herds into different places, and the expense and trouble of collecting, herding, and caring for them is thereby largely increased.

That sheep, moving in large bands over lands, crop the
10 same as they go, and usually travel three or four miles a day, and as they go reduce the lands over which they pass to barren wastes.

That if the defendants, or either of them, are permitted to drive and pasture their said sheep on the said lands of plaintiffs, as they threaten they will do, and as in the past they have done, the said lands of plaintiffs will be greatly damaged and for a long period of time in the future rendered valueless to plaintiffs for the purposes of grazing and pasturing their cattle.

That there is no adequate way of estimating the amount of damages which will be suffered by plaintiffs should the defendants, or either of them, do as they threaten to do as herein stated, for the reason, among others, that the destruction of the food, grasses, and herbage on plaintiffs' said lands will result in depriving plaintiffs' said cattle of necessary food, and thereby cause loss and great deterioration in flesh, and consequent value, which loss and deterioration cannot be adequately determined by witnesses; and there is no adequate way of compensating in money damages the wrongs and injuries threatened as aforesaid, and the same, if suf-

fered, will result in the destruction of plaintiffs' business in raising and growing stock, and will waste and impair their freehold and obstruct them and each of them in the use of their said property, and deprive them of the beneficial enjoyment of the same.

Plaintiffs allege that they have no plain, speedy, or adequate remedy at law, and if defendants are suffered to commit said threatened wrongs plaintiffs will be compelled to bring a multi-
11 plicity of suits for damages and to prosecute and continue an exhaustive and interminable litigation, with no assurance of recovering adequate compensation for their losses, and in the meantime that their business will be destroyed.

That owing to the situation of the plaintiffs' said lands and the great extent of country covered thereby, as hereinbefore set forth, and the numerous parties defendants herein, who threaten to, and unless restrained by the order of said court will, drive and graze their sheep on plaintiffs' said lands as aforesaid, it would be impossible for plaintiffs to establish the amount of damages which they would suffer by such wrongful act and trespass of any particular one of the said defendants.

Wherefore plaintiffs pray the judgment and decree of said court—

1st. That said defendants have not nor has either of them any right of way for any of his or their sheep over said lands of plaintiffs or any part thereof, except over and along the highways aforesaid; that they have not nor has either of them any right to graze or pasture any of his or their sheep thereon or on any part thereof.

2d. That pending this action said defendants and each of them, their and each of their agents, servants, and employees, be enjoined from driving any of his or their sheep upon any of said lands, except over and along said highways, or permitting any of them to go, graze, or pasture thereon, and that upon the final decree herein said injunction be made perpetual.

12 3d. For such other and further relief as may be just and equitable, together with their costs in this behalf incurred.

W. H. DICKSON,
Attorney for Plaintiffs.

BENNETT, KIRKPATRICK & BRADLEY AND
C. S. VARIAN, *Of Counsel.*

(Duly verified.)

Endorsed: No. 7210. Title. Complaint. Filed February 29th, 1888. Henry G. McMillan, clerk. W. H. Dickson, attorney for plaintiffs. Bennett, Kirkpatrick & Bradley and C. S. Varian, of counsel. Issued March 2d, 1888.

Demurrer to Complaint.

(Title.)

Come now the defendants above-named, and each separately demurring to the complaint on file in above-entitled action for grounds of demurrer alleges—

First. That said complaint does not state facts sufficient to constitute a cause of action against him.

Second. That several causes of action have been improperly united in this complaint in this, that said complaint states a separate cause of action against each individual defendant in said
13 action and nowhere states or attempts to state a cause of action against all of the defendants.

Wherefore said defendants pray judgment against the plaintiffs and for costs.

KIMBALL & WHITE,
Attorneys for Defendant.

Endorsed: Title. Demurrer. Filed April 14, 1888. Henry G. McMillan, clerk. Received copy within April 14th, 1888. Bennett, K. & P., attorneys. Kimball & W., attorneys for Houtz *et al.*

Order Sustaining Demurrer.

(Title.)

The demurrer to the complaint herein having been heretofore argued and submitted, and the court being now fully advised, it is ordered that said demurrer be, and the same is hereby, sustained, and plaintiffs except, and plaintiffs have until Saturday, April 21, 1888, in which to amend the complaint herein.

April 17th, 1888.

Judgment.

(Title.)

14 On this 18th day of April, 1888, plaintiffs, by their attorneys, Wm. H. Dickson and C. S. Varian, are present in open court; also the said defendants, by their attorney, James N. Kimball, Esq., and plaintiffs' said attorneys withdraw their application to amend their complaint, and also waive the time allowed and given by the court to amend complaint in the order herein made on the 18th day of April, 1888, and stand by their complaint herein.

Whereupon, on motion of attorney for defendants, it is by the court ordered, adjudged, and decreed that plaintiffs' complaint herein be dismissed, and that said plaintiffs take nothing by their said suit; and it is further ordered, adjudged, and decreed that said defendants have and recover of and from said plaintiffs their costs in this behalf expended and amounting to the sum of ten dollars.

Judgment entered April 18th, 1888.

A true copy.

Attest:
[SEAL.] HENRY G. McMILLAN, *Clerk.*

Endorsed: 7210. Title. Judgment. Filed April 18, 1888. Henry G. McMillan, clerk.

Assignment of Errors on Appeal.

I.

The court erred in sustaining the demurrer.

15 II.

The court erred in rendering judgment dismissing plaintiffs' complaint.

W. H. DICKSON,
Attorney for Plaintiffs.

Notice of Appeal.

(Title.)

To the above-named defendants and to Messrs. Kimball & White, their attorneys:

Please take notice that the plaintiffs above named appeal to the supreme court of Utah Territory from the judgment entered herein on the 18th day of April, 1888, in said court dismissing the plaintiffs' complaint and adjudging costs against the plaintiffs and in favor of defendants, and from the whole of said judgment.

Dated May 1st, 1888.

W. H. DICKSON,
Attorney for Plaintiffs.

C. S. VARIAN AND
BENNETT, KIRKPATRICK & BRADLEY,
Of Counsel.

Endorsed: Title. Notice of appeal. Copy deposited in U. S. mail May 1st, 1888, postage prepaid, addressed to attorneys for defendants. (W. H. D.) Filed May 1st, 1888. Henry G. McMillan, clerk.

16 *Bond on Appeal.*

(Title.)

Whereas the said plaintiffs are about to appeal to the supreme court of Utah Territory from the judgment entered in the said district court in the above-entitled action on the 18th day of April, 1888, dismissing plaintiffs' complaint and adjudging costs in favor of said defendants and against the plaintiffs:

Now, in consideration of the premises and of said appeal, we, W. S. McCornick and W. H. Remington, of Salt Lake City and county, Utah Territory, do hereby, jointly and severally, undertake and promise, on the part of said appellants, that the said appellants will pay all damages and costs which may be awarded against them on said appeal or on a dismissal thereof, not exceeding three hundred dol-

lars, in which amount we acknowledge ourselves, jointly and severally, bound.

Witness our hands and seals this first day of May, 1888.

W. S. McCORNICK. [SEAL.]
W. H. REMINGTON. [SEAL].

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

W. S. McCornick and W. H. Remington, the sureties in the foregoing undertaking, being duly sworn, each for himself says that he is a resident and freeholder within said Territory and worth
17 the sum of three hundred dollars over all his debts and liabilities exclusive of property exempt from execution.

W. S. McCORNICK.
W. H. REMINGTON.

Subscribed and sworn to before me this first day of May, 1888.

JOSIAH BARNETT,
Notary Public.

Endorsed: Title. Bond on appeal. Filed May 1st, 1888. Henry G. McMillan, clerk.

Certificate of Clerk.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Henry G. McMillan, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full and correct copy of the complaint, demurrer to the complaint, order sustaining the demurrer, final judgment, and notice and undertaking on appeal in the case of M. B. Buford *et al. vs.* John S. Houtz *et al.*

Witness my hand and seal of said court, at Salt Lake City, this 29 day of May, 1888.

[SEAL.]

HENRY G. MILLAN,
Clerk 3d Dist. Court, Utah Terr'y.

18 MONDAY, *June 11th, A. D.* 1888.

A session of the supreme court of Utah Territory was held this day, beginning at ten o'clock a. m. * * *

M. B. BUFORD *et al.*, Appellants,

vs.

JOHN S. HOUTZ *et al.*, Respondents.

From 3d dist.

This cause, by agreement of counsel of the respective parties, was submitted to the court without argument and taken under advisement.

TUESDAY, *June 26th, A. D.* 1888.

A session of the supreme court of Utah Territory was held this day, beginning at two o'clock p. m., pursuant to adjournment.

Present and presiding, the Hon. C. S. Zane, chief justice; present also, the Hon. J. S. Boreman, associate justice, and the Hon. H. P. Henderson, associate justice; the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

M. B. BUFORD, J. W. TAYLOR, CHARLES CROCKER, and GEORGE CROCKER, Partners, &c., Appellants,

vs.

19 JOHN S. HOUTZ, HENRY CONANT, & EDWARD CONANT, Partners, &c.; Israel Hunsacker, P. Healey, A. Patterson, Hiram Hunsacker, James Hamlin, Z. Ballentine, Robert Hunsacker, C. H. Davis, Chris. Jansen, Chris Anderson, Moroni Jensen, Thomas Smart, J. Q. Shirley, J. D. Blake, John Egbert, John Home, George I. Wood, Nathaniel Ireland, John Canfield, Cajetan Ducheneau, and The Box Elder Stock and Mercantile Company, a Corportion, Respondents.

From 3d dist.

This cause having been heretofore submitted on briefs of the respective counsel, and the court being sufficiently advised thereon, it is now here ordered, adjudge, and decreed that the judgment of the district court therein be, and it is hereby, affirmed, and that respondents have and recover of and from appellants their costs herein.

Thereafter said appellants, by their counsel, ask that an appeal from this judgment to the Supreme Court of the United
20 States be allowed, and that the amount of a bond to be given thereon be fixed; whereupon it is ordered that such appeal be, and it is hereby, allowed, and the amount of said bond be, and is hereby, fixed at three hundred dollars.

21 In the Supreme Court of Utah Territory. June Term, 1888.

M. B. BUFORD *et al.*, Appellants,

vs.

JOHN S. HOUTZ *et al.*, Respondents.

BOREMAN, justice, delivered the opinion of the court:

Plaintiffs brought suit against defendants to restrain them from pasturing sheep on the lands of plaintiffs, and for other purposes.

The plaintiffs claim to own a great variety of alternate sections of railroad lands, and charge that the defendants own separate and distinct flocks of sheep, but pasture them in various parts of these alternate sections of land. The defendants demurred to the com-

plaint, alleging, as ground of demurrer, that the complaint does not state facts sufficient to constitute a cause of action, and that it improperly unites different causes of action. The demurrer was sustained, and, the plaintiffs electing to stand on their complaint, the action was dismissed by the court. From this judgment
22 of dismissal the plaintiffs have appealed to this court. The case has been submitted without briefs and without argument.

The assignment of errors has reference wholly to the sustaining of the demurrer and the consequent dismissal of the action.

The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. It is a well-recognized fact, and one of which the court will take judicial notice, that a very large proportion of the lands in this region *are* used for grazing purposes, and for such purposes alone. It becomes a necessity, therefore, that the strict rules regarding trespass upon lands are not entirely applicable or at least are very much modified. These lands were all originally Government lands and are mostly so at the present time. The Government has tacitly given the public the privilige of pasturing on these lands, and the common practice is for the settlers to use them in common, except where they may be fenced. When the Government has made a transfer of any
23 such lands and thereafter they were allowed to remain open as before the transfer the practice of using them as common pasturage has continued. The lands involved in the present suit are alternate sections in a tract of country forty miles long and thirty-six miles wide. Through this tract of county there are four public roads running north and south and three such roads running east and west.

It is not stated in the complaint whether the sections not owned by these plaintiffs would be reached by these roads or not. Those sections not owned by the plaintiffs are still owned by the Government, except in such instances as where parties have obtained a title from the Government. Those owned by the Government are open to occupancy and settlement, but settlers could not reach them if situated off from the roads referred to, and settlers with their flocks and herds reaching them would necessarily have to pass over some lands of the plaintiffs. If, therefore, any injunction were issued against such parties in accordance with the complaint they
24 would be liable for contempt of court and be subjected to a heavy cost and inconvenience. If this injunction were granted it would become obligatory for all settlers passing through the country and all herdsmen to be constantly hunting the corners and boundaries of the plaintiffs' lands, none of which lands are fenced. It would be a source of great vexation and annoyance to the settlers and herdsmen and virtually prevent their use of the Government lands. The plaintiffs have had the privilege of passing over Government lands in reaching their lands, and have had the privilege of pasturing on Government lands in connection with their own. As long as they do not fence their lands they ought not to complain that other people use their lands in the manner they had used the public lands.

Some of the lands of the plaintiffs are alleged not such as would justify the costs of fencing. The damage by the herdsmen, therefore, to such lands, therefore, would be very slight. The granting
25 of the injunction as prayed would give the plaintiffs virtual use of their own lands and also of all lands within this vast tract of forty by thirty-six miles.

Under all the circumstances stated in the complaint we do not think that the facts stated were sufficient to justify the issuing of an injunction or for granting any relief prayed for.

The demurrer was properly sustained, and we see no error in the dismissal of the action. The judgment of the court below is affirmed.

Zane, C. J., concurs.

Henderson, A. J., concurs.

Endorsed: Filed 26th June, 1888. E. T. Sprague, clerk.

26 The United States of America to John S. Houtz, Henry Conant, and Edward Conant, partners doing business under the firm name of Houtz & Conant; Israel Hunsacker, P. Healey, A. Patterson, Hiram Hunsacker, James Hamlin, Z. Ballentine, Robert Hunsacker, C. H. Davis, Chris. Jensen, Chris. Anderson, Moroni Jensen, Thomas Smart, J. Q. Shirley, John Doe Blake, John Egbert, John Home, George I. Wood, Nathaniel Ireland, John Canfield, Cajetain Ducheneau, and The Box Elder Stock and Mercantile Company, a corporation, and J. N. Kimball, your attorney, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pur-
27 suant to and to answer an appeal in a suit in which M. B. Buford, J. W. Taylor, Charles Crocker, and George Crocker are appellants and you are appellees, to show cause, if any there be, why a judgment of the supreme court of Utah Territory rendered against said appellants in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. C. S. Zane, chief justice of the supreme court of Utah Territory, this the 17th day of July, A. D. 1888.

C. S. ZANE,
Chief Justice of Supreme Court of Utah Territory.

28 Service of within citation admitted on behalf of all of the appellees this the 17th day of July, A. D. 1888.

KIMBALL & WHITE,
Attorneys for Appellees.

29 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the Supreme Court of Utah Territory.

M. B. BUFORD, J. W. TAYLOR, CHARLES CROCKER, and GEORGE CROKER, Copartners Doing Business under the Firm Name and Style of The Promontory Stock Ranch Company, Plaintiffs,

vs.

JOHN S. HOUTZ, HENRY CONANT, and EDWARD CONANT, Partners Doing Business under the Firm Name and Style of Houtz & Conant; Israel Hunsacker, P. Healey, A. Patterson, Hiram Hunsacker, James Hamlin, L. Ballentine, Robert Hunsacker, C. H. Davis, Chris. Jensen, Chris. Anderson, Moroni Jensen, Thomas Smart, J. Q. Shirley, John Doe Blake, John Egbert, John Home, George I. Wood, Nathaniel Ireland, John Canfield, Cagista Ducheneau, and The Box Elder Stock and Mercantile Company, a Corporation, Defendants.

John W. Taylor, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled cause; that the matter in dispute or amount in controversy in said cause, exclusive
30 of costs, exceeds the sum of five thousand dollars; that the lands of said plaintiffs described in the complaint in said cause exceed in value the sum of four hundred thousand dollars, and said plaintiffs have invested in their business of stock-raising, mentioned in said complaint, and had invested therein at the time of the commencement of the above-entitled action, more than one hundred thousand dollars, exclusive of said lands; that if said defendants are not enjoined from grazing and pasturing sheep upon said lands, as they threaten to do, and claim and assert a right so to do at will, as set forth in said complaint—and to enjoin them from so doing and to have their said asserted right so to do decreed to be without foundation said action was brought—the said lands of said plaintiffs will be depreciated in value more than one hundred thousand dollars and plaintiffs' said business utterly destroyed.

JOHN W. TAYLOR.

Subscribed and sworn to before me this 17th day of July, A. D. 1888.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed: Filed July 17th, 1888. E. T. Sprague, clerk.

31 M. B. BUFORD, J. W. TAYLOR, CHARLES CROCKER, and GEORGE Crocker, Copartners Doing Business under the Firm Name of Promontory Stock Ranch Co., Appellants,

vs.

JOHN S. HOUTZ, HENRY CONANT, and EDWARD CONANT, Partners Doing Business under the Firm Name of Houtz & Conant; Israel Hunsacker, P. Healey, A. Patterson, Hiram Hunsacker, James Hamlin, Z. Ballentine, Robert Hunsacker, C. H. Davis, Chris. Jensen, Chris. Anderson, Moroni Jensen, Thomas Smart, J. Q. Shirley, John Doe Blake, John Egbert, John Home, George I. Wood, Nathaniel Ireland, John Canfield, Cajetan Ducheneau, and The Box Elder Stock and Mercantile Company, a Corporation, Respondents.

Know all men by these presents that we, James Lowe, of Salt Lake City, Utah Territory, and W. S. McCornick, of Salt Lake City, Utah Territory, are held and firmly bound unto the respondents above named and each of them in the full and just sum of
32 three hundred dollars, to be paid to the said respondents and each of them, their and each of their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of July, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a term of the supreme court of the Territory of Utah, on the 26th day of June, A. D. 1888, in a suit depending between the appellants above named and the respondents above named, judgment was rendered against the said appellants and in favor of the said respondents, and the said appellants having obtained the allowance of an appeal from said supreme court of the Territory of Utah to the Supreme Court of the United States to reverse the said judgment in the aforesaid suit, and a citation directed to the said respondents citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Wash-
33 ington on the second Monday of October next:

Now, the condition of this obligation is such that if the said appellants shall prosecute the said appeal to effect and answer all damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and virtue.

W. S. McCORNICK.
JAMES LOWE.

Sealed and delivered in presence of—
J. BARNETT.
T. D. KIMBALL.

Approved by—
C. S. ZANE,
Chief Justice Supreme Court of Utah.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

James Lowe and W. S. McCornick, whose names are subscribed as sureties to the within undertaking, being each duly and severally sworn, each for himself says that he is a resident of said county of Salt Lake, in the Territory of Utah; that he is worth the amount specified in said undertaking as the penalty thereof over and
34 above all his debts and liabilities exclusive of property exempt from execution.

W. S. McCORNICK.
JAMES LOWE.

Subscribed and sworn to before me this 17th day of July, A. D. 1888.

[SEAL.] JOSIAH BARNETT.
Notary Public.

Endorsed: Filed July 17th, 1888. E. T. Sprague, clerk.

35 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court in the cause of M. B. Buford and others against John S. Houtz and others, transmit, hereto annexed, a transcript of the record and proceedings, opinion, affidavit of amount in controversy, and bond on appeal, with the original citation, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, said proceedings, opinion, affidavit, and bond is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of said supreme court of Utah Territory this 27th day of July, 1888, at Salt Lake City.

[Seal United States of America Supreme Court, Territory of Utah.]

E. T. SPRAGUE,
Clerk of Supreme Court.

Endorsed on cover: Utah Territory supreme court. No. 1056. M. B. Buford, J. W. Taylor, Charles Crocker, and George Crocker, copartners doing business under the firm name and style of The Promontory Stock Ranch Company, appellants, *vs.* John S. Houtz, Henry Conant, & Edward Conant, partners doing business under the firm name & style of Houtz and Conant; Israel Hunsacker, *et al.* Filed August 13, 1888.

Office Supreme Court U. S.
FILED.
DEC 4 1889
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

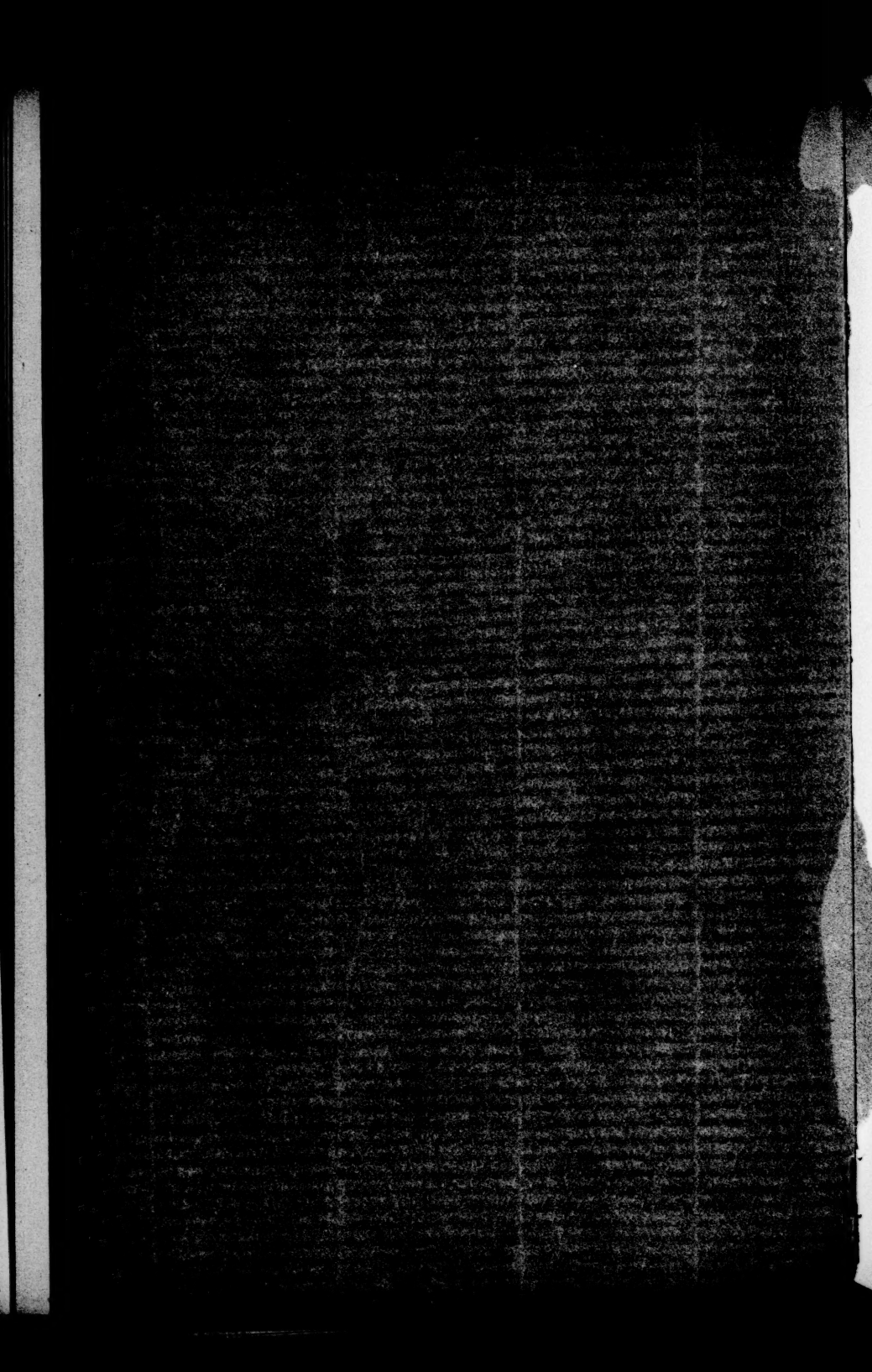
M. B. BUFORD ET AL.,
Appellants,
vs.
JOHN S. HOUTZ, ET AL.,
Respondents.

APPELLANTS' BRIEF.

M. KIRKPATRICK,
Attorney for Appellants.

KIMBALL & WHITE,
Attorneys for Respondents.

Star Print, Salt Lake.



IN THE

SUPREME COURT OF THE UNITED STATES.

M. B. BUFORD ET AL.,
Appellants,
vs.
JOHN S. HOUTZ, ET AL.,
Respondents.
No. 1056.

APPELLANTS' BRIEF.

In this action the court below having sustained the demurrer to the plaintiffs' complaint, and the plaintiffs electing to stand by their complaint and declining to amend, judgment was rendered in the court below dismissing the complaint, on the ground that the same did not state a case entitling the plaintiffs to any relief. The case now comes up on appeal from said judgment of dismissal.

It appears from the allegations of the complaint that the plaintiffs are, and at all the times mentioned therein were, the owners, in possession, and entitled to the possession of the lands in said complaint described, comprising upwards of 350,000 acres, extending over an area of forty miles in a northerly and southerly direction, by about thirty-six miles in an easterly and westerly direction. It will appear from the reading of the complaint that the lands so owned by plaintiffs are the odd numbered sections in the townships mentioned, and that plaintiffs' title thereto is derived by conveyances from the Central Pacific Railroad Company, a corporation, the successor in interest and grantee of the Central Pacific Railroad

Company of California, to which last named company all of said lands were granted by the Congress of the United States. That all the alternate or even numbered sections embraced within said area over which plaintiffs' lands extend, are part of the unoccupied public domain of the United States; that neither of the respondents has nor has ever had any right, title, interest, possession, or right of possession in or to any of the lands embraced in the townships or fractional townships mentioned in the complaint, whether even or odd numbered sections. That the said lands of plaintiffs are of great value for the pasturage and grazing of stock; that the same were acquired and were held for such purposes solely; that owing to the character of the lands and the scarcity of water, and the aridity of the climate where the same are situated, they can never be subjected to any other beneficial use. That the appellants are engaged in the business of stock raising, and own upward of twenty thousand head of horned cattle, of the value of more than one hundred thousand dollars; which at the time of the commencement of the action were, and for a long time had been running and grazing on said lands; that the plaintiffs have no other lands on which they can graze and pasture said cattle or any part thereof, and no means whereby they can keep or maintain the same or any part thereof except by pasturing said cattle upon their said lands. That their lands are of no value to plaintiffs except for the pasturage of cattle. That none of the lands included in said townships and fractional townships are enclosed except small portions of said lands of plaintiffs, which they have heretofore enclosed for use as corrals, within which from time to time to gather their said cattle in order to brand the young thereof. That it is impossible for plaintiffs to fence and enclose their said odd numbered sections without enclosing large portions of the interjacent even numbered sections of the public lands. That, moreover, plaintiffs cannot enclose their said lands without rendering large and valuable portions thereof of little or no value for pasturage because the plaintiffs' cattle would thereby prescribed from obtaining necessary water, which is to be found only at isolated and widely separated points on said lands.

It further appears from the complaint that the defendants

owned severally large bands of sheep, aggregating more than two hundred thousand head.

That the United States official surveys have been extended over all the lands embraced in the townships and fractional townships mentioned in the complaint.

That there are seven convenient, well known, defined and regularly traveled highways, four of which run in a northerly and southerly direction, and three of which run in an easterly and westerly direction, entirely across the land embraced within said townships.

That each of the defendants claims and asserts that he has the lawful right and is entitled to drive all sheep owned by him over, across and upon any and all said lands of plaintiffs, and to graze and pasture the same thereon whenever and wherever he may desire so to do.

That all said defendants rely upon and set up a common, though not a joint pretended right, as the foundation of the said asserted right of each so to drive, graze and pasture his sheep thereon, and that each of them bases his pretended and asserted right so to do upon precisely the same state of facts as that relied upon by each of the other of said defendants, in the assertion of his pretended right so to do, and not upon any other or different state of facts: that is to say, each of said defendants claims that all the even numbered sections in said townships and fractional townships, being unoccupied public domain of the United States, he has an implied license from the Government of the United States to graze and pasture his sheep thereon, and that the benefit of such license cannot be enjoyed by him, unless he is permitted to have his sheep run, graze and pasture upon said lands of plaintiffs; and, therefore, he claims that he is entitled to have his sheep graze and pasture upon plaintiffs' said land.

That in pursuance of said asserted right, each of said defendants has in the past driven large herds of sheep over and across said lands of plaintiffs', and grazed and pastured the same thereon, to the great injury and damage of plaintiffs, and that each of said defendants, in pursuance of such claim and asserted right so to do, threatens and is about to, and unless restrained by the order of the court, will drive large herds

of sheep upon and across plaintiffs' said lands, and graze and pasture the same thereon, whenever and wherever he so desires.

That sheep in pasturing on lands crop the grasses close to the ground, and with their feet cut and bruise the roots of grasses and herbage under the surface and leave the lands over which they have grazed barren wastes, the result in a dry and arid climate as that of Utah being such that it requires years of non-use of lands so pastured to be restored.

That the droppings of sheep on lands is so offensive to horned cattle that they will not range or feed on lands on which sheep have been pastured, and that unless restrained by herders and enclosures, they will wander away therefrom, and in moving will scatter in small herds to different places, thereby greatly increasing the expense and trouble of herding, collecting and caring for them.

That there is no adequate way of estimating the amount of damages which plaintiffs would suffer, should defendants do as they threaten to do, for the reason, among others, that plaintiffs' cattle being thereby deprived of necessary food would suffer loss and great deterioration in flesh and consequent value, which loss and deterioration cannot be adequately determined by witnesses.

That the wrongs and injuries so threatened by defendants will result in the destruction of plaintiffs' business of raising and growing stock, waste and impair their freehold, obstruct them in the lawful use of their property and deprive them of the beneficial enjoyment of the same.

Plaintiffs allege that they have no plain, speedy and adequate remedy at law for the threatened wrongs and injuries, but on the contrary, if defendants are suffered to commit the same, the plaintiffs will be compelled to bring a multiplicity of suits for damages, and to prosecute and continue an exhausting and interminable litigation with no assurance of recovering adequate compensation for their losses, and that in the meantime their business will be destroyed; and moreover, owing to the situation of plaintiffs' lands, the great extent of country covered thereby, and the numerous parties defendants herein, who threaten to, and unless restrained, will

drive and graze their sheep on plaintiffs' lands as aforesaid, it will be impossible for plaintiffs in an action at law, (wherein they would be required to proceed against each of said defendants separately) to establish the amount of damages which the plaintiffs had suffered by such wrongful acts and trespasses of any particular one of the defendants.

The prayer of the complaint is that the judgment and decree of the court be, that the said defendants have not, nor has either of them, any right of way for any of his or their sheep over said lands of plaintiffs, or any part thereof, except over and along said highways; that they have not, nor has either of them, any right to graze and pasture any of his or their sheep thereon, or any part thereof; and that they be enjoined therefrom.

The complaint was demurred to on the following grounds:

1.—That it did not state facts sufficient to constitute a cause of action against either of said defendants.

2.—That several causes of action had been improperly united in the complaint in this, that the complaint states a separate and distinct cause of action against each defendant, and nowhere states or attempts to state a cause of action against all of said defendants.

It is unnecessary to state that all material facts set up in the complaint are admitted by the demurrer to be true.

At the outset we call attention to the fact that under the statutes of Utah Territory, where these lands are situated, the plaintiffs are under no obligation to enclose their lands with fences, even were it practicable to do so On the contrary, each of the defendants would be liable to plaintiffs in damages for any trespass of their sheep upon the unenclosed lands of lands of plaintiffs Subdivision 3, of Section 3, of Chapter 8, of Laws of Utah, 1886, page 9, provides: "If any neat cattle, horses, mules, sheep, goats or hogs shall * * * do damage on the premises of any person, whether said premises are protected by a fence or not, the person aggrieved thereby may recover damages either by an action against the owner of the trespassing animals, or by impounding them in the precinct pound."

Section 4 of the same act attempts to provide a means

whereby any county, or precinct thereof, may be taken out of the operation of Subdivision 3, of Section 3, above quoted, but it cannot be pretended that said Section 4, has any application in this case.

It is unnecessary to cite authorities to the proposition that at common law every unwarrantable entry on another's land whether fenced or unfenced is a trespass. The law bounds every man's property, and is his fence.

The Statute of Utah has simply adopted this rule of the common law. The defendants then are trespassers as alleged in the complaint, and liable to the plaintiffs as such, and they are, and each of them is threatening and about to commit repeated trespasses on the lands of plaintiffs, for which no adequate relief can be obtained in an action at law, as will hereafter more clearly appear, and the question is whether or not equity has the power to prevent the threatened wrongs and injuries.

Recurring to the ground stated in the demurrer we submit:

I.

The charge of misjoinder of cause of action is based upon the fact that each of the defendants is pursuing his business severally without any connection with the others, and without any joint intent or joint action; and the contention is that the cause of action is distinct and several as against each, and that neither the defendants, nor the several causes of action can be joined in the same suit.

Upon this subject the case of Woodruff vs. North Bloomfield Gravel Mining Company is in point—we refer to the opinion of the court upon the demurrer to the complaint in that case. (8 Sawyer, 628.)

Several parties owning extensive mines at various points on the affluents of the Yuba River in the State of California, worked them independently of each other, by the hydraulic process, discharging the waste and debris into the streams on which the mines were situated, whence it was borne down by the currents of water into the main river and passing on was deposited in one indistinguishable mass along the course of

the river in the valley below, burying valuable lands of the plaintiff. The plaintiff sought to enjoin the mining operations of the defendants. There was a demurrer to the complaint upon the grounds of misjoinder of defendants and multifariousness.

The United States Circuit Court, Sawyer, Circuit Judge, in overruling the demurrer, on both grounds, said: "It is true that each defendant is, independently, working its own mines without any conspiracy or preconcert of understanding or action with the others, but they all pour their mining debris into the several streams, which they know must by the force of the currents be carried down into the main river, where they must commingle into one indistinguishable mass long before they reach the point where the nuisances complained of are committed and the damages are created. This commingling of the debris discharged into the various streams by the several defendants and passing on to work the destruction alleged—this aggregation of waste material, which after aggregation is precipitated upon the plain below and creates the nuisance is the necessary and natural consequence of the action of the several defendants. There is, therefore, a cooperation in fact, if not in intent of these several defendants in the production of the nuisance. The injury is the joint effect of acts originally several, but combined before the debris is precipitated upon the lands below and the injury is effected; and in contemplation of equity it constitutes a single cause of action. There is a common interest in the right claimed, to discharge debris into the streams. The defendants each and all claim a common. though not a joint right. The final injury is a single one, a single result of the combined operation of this debris, and all the defendants cooperate in fact in producing it. No damages are sought. Only equitable relief is demanded by restraining future action, a future contribution by each to the nuisance."

Again (p. 632-3) the court says:

"There is a very great difference between seeking to recover damages at law for an injury already inflicted by several parties, acting independently of each other, and restraining

parties from committing a nuisance, or from contributing to create or increase a nuisance in the future. In equity the court is not tied down to one particular form of judgment. It can adapt its decrees to the circumstances of each case, and give the proper relief as against each party, and without reference to the action of others, and without injury to either. Each is dealt with in respect only to his own acts, either as affected or unaffected by the acts of others. It is not necessary for the purpose of prevention of further injury to ascertain what particular share of the damages each defendant has inflicted in the past, or is about to inflict in the future. It is enough to know that he has contributed, and is continuing to contribute to a nuisance, without ascertaining to what extent, and to restrain him from contributing at all. But, if otherwise, I do not perceive why the proportion of the injury inflicted by each may not be ascertained when practicable and the decree adapted to give a proper remedy as to each.

"The very object of establishing courts of equity was to furnish a tribunal adapted to do complete justice in complex cases, often involving many parties, in which the courts of law by reason of their restricted powers resulting from their mode of proceeding could not afford adequate relief. No inconvenience or additional costs can result to the several defendants in this suit from being joined with others who also contribute to the same nuisance by originally independent action, action in its inception and first stages several, but ultimately co-operating to produce the nuisance. On the contrary, it is convenient to dispose of it in one case, and the costs are diminished to each individual rather than increased by a single suit. The costs can be apportioned in equity, if proper, and the administration of justice is thus facilitated. In fact it is the only adequate mode of proceeding in cases like this."

The case at bar cannot be distinguished from the above case of Woodruff vs. North Bloomfield Company in any material particular. In this case as in that, each defendant acts independently, without conspiracy or preconcert with the others; there is no joint intent or joint action. But the injury is single, the single result of acts originally several, and

all the defendants co-operate in producing it, and the defendants set up a common though not a joint right, based upon the same state of facts, to commit the acts complained of. Each claims a license from the government to graze his sheep on the even numbered sections of the public lands, and that he cannot exercise that license without having them run and graze upon the adjacent odd numbered sections belonging to to the plaintiffs. The contribution of each defendant to the final injury inflicted on the plaintiffs is not to be distinguished from those of the others. That injury consists in rendering worthless the plaintiffs' lands for the only use for which they are of any value to the plaintiffs, namely, as pasturage for horned cattle; and this is accomplished in two ways by exterminating the grasses, root and blade, and by the offensive droppings of the herds. Now it would be as impracticable to distinguish the injury done in these respects by different bands of sheep pursuing the same general course across the plaintiffs' lands, the various herds of the several defendants often commingling, as to distinguish the debris from the different mining claims after it had been blended in a common mass.

But if it were otherwise and if it were possible to ascertain the proportion of injury inflicted by each band or herd, this, though it would be fatal to an action at law for damages against all of the defendants, would not be a valid objection to the complaint in the present action, which is not an action for damages, but an action in equity, seeking equitable relief solely by way of injunction. "For," says Judge Sawyer in the case above cited, "I do not perceive why the proportion of the injury inflicted by each may not be ascertained when practicable, and the decree adapted to give a proper remedy as to each."

Thorpe vs. Bumfitt, 8 L. R. Ch. Appeals 656, is referred to by Judge Sawyer in the "Mining Debris Case," and is clearly in point; a bill for an injunction was supported against several parties acting individually and severally in blocking up the passage to an inn, by loading and unloading wagons in it in the prosecution of their several callings. "Suppose," says the English court in deciding the case, "one person leaves

a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to use the way has a right to prevent, and it is no defense to any one person among the hundred to say that what he does causes no damage to the complainant."

See also Chapman vs. Palmer, 77 N. Y., 56, holding that an equitable action will lie to restrain parties who severally contribute to a nuisance, while it holds they cannot be joined in an action at law.

Blasdell vs. Stephens, 14 Nev. 22, a combined suit at law to recover damages for a nuisance, and in equity to restrain its continuance; the two defendants separately and independently of each other allowed water to run from his lands upon the plaintiff's lands, the effect being to injure plaintiff's ditch. The court held that there could be no joint recovery at law for damages, but that it was a proper case for injunction.

Keys vs. Little York Company, 53 Cal., 724, is contra, but is in effect overruled by the same court in the later case of Hillman vs. Newington, 57 Cal., 56.

In Gaines vs. Chew, 2 How., 642, the Supreme Court of the United States says in regard to multifariousness, that there is no rule universally applicable. "Every case must be governed by its own circumstances, and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interest may have arisen under distinct contracts.

See also Oliver vs. Piatt 3 How. (U. S.) 412.

In Central Pacific R. R. Co. vs. Dyer, 1 Sawyer 641, the plaintiff filed a bill against a large number of persons to determine the estate and interest claimed by them in the lands constituting the right of way of plaintiff, and on which plaintiff's railroad, and improvements appurtenant thereto, are

built—plaintiff claiming to derive title under the Congressional grant. It was alleged that the defendants severally claimed some interest in said lands, adverse to the plaintiff; each claiming distinct parcels under alleged purchases from the Government of the United States; that they threaten to bring distinct actions at law against plaintiff for alleged trespasses on said premises. There was a demurrer to the bill; with reference to which the court said: "The objection taken by demurrer that the defendants are improperly joined, or more correctly speaking, that the bill is multifarious, because it is averred therein that the defendants claim separate and distinct parcels, is not well taken."

In actions to quiet title to lands against persons setting up adverse claims, the rule is that all such persons are properly made defendants.

Fisher vs. Hepburn, 48 N. Y., 41-55.
Pomeroy's Remedies, Sec. 372.

The general rule in equity seems to be that if the parties have a common interest touching the matter of the bill, although they claim under distinct titles and have independent interests, they may be united.

Comstock vs. Rayford, 1 S. & M., 423.
S. C. 40 Am. Dec. 102 and note, p. 106.

Fellows vs. Fellows, 4 Cowen, 682, (S. C. 15, Am. Dec. 412 and note, p. 427). This was a bill to vacate fraudulent transfers of property which had been conveyed and parcelled out by its owner in severalty to a number of persons, all of whom were made defendants. There was a demurrer on the ground of multifariousness. This was overruled, the court saying, "that where several persons, although unconnected with each other are made defendants, *a demurrer will not lie if they have a common interest centering in the point in issue in the cause.* Nor will it lie when one general right is claimed by the bill, though the defendants have separate and distinct rights.

The objection of multifariousness does not hold "where

one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights."

Dimmock vs. Bixby, 20 Pick., 377.

"Where the object of a suit is single, but different persons have or claim separate interests in distinct or independent questions, all connected with and arising out of the single object of the suit, the complainant may bring such different persons before the court as defendants, so that the whole object of the bill may be obtained in one suit, and to prevent further unnecessary and useless litigation." Chancellor Walworth in Boyd vs. Hoyt, 5 Paige, 65.

"Indeed the application of the rule against multifariousness must necessarily rest largely in the discretion of the court in each particular case, for the rule itself is to a considerable extent one of convenience. The court will in each case, choose that course which seems most likely to enable it to do complete equity in the particular case, with the least delay, expense and trouble, striving on the one hand to obviate the necessity of a multiplicity of suits, and on the other to avoid vexing individual defendants with the litigation of questions with which they have no concern."

Bowers vs. Keesecher, 9 Iowa, 442.

Note to Fellows vs. Fellows, 15 Am. Dec. 427, and cases there cited.

Bugbee vs. Sargent, 23 Me., 269.

Lewis vs. St. Albans Iron Works, 50 Vt., 477.

Butler vs. Spawn, 27 Miss., 234.

A bill in equity is not demurrable for multifariousness, where the plaintiffs claim by a single, general and entire right, although in opposition to the distinct and separate rights of several defendants.

Vann vs. Gregory, 2 Dev. & B. (N. C.), 31.

S. C., 32 Am. Dec., 689 and note.

II.

The complaint states a good cause of action in equity for injunctive relief.

1.—There is no plain and adequate remedy at law. There is no satisfactory or fairly adequate way of estimating the amount of damages which plaintiffs would sustain by the roaming and pasturing upon their lands of such enormous herds of sheep. The amount of direct damages recoverable at law, would be matter of conjecture. The lands grazed over would be rendered worthless for the purpose of the plaintiffs for an indefinite period of time. It is alleged in the complaint that in a dry and arid climate like that of Utah, it requires years of non-use for lands so pastured to be restored. The length of time would depend much upon the character of the seasons, as unusually wet or dry. It would be difficult or impossible to approximate the damage which would ensue from collecting, herding and caring for cattle which have been expelled from their accustomed ranges by the intrusion of sheep. And from the nature of the case it would be impracticable to ascertain the amount of injury committed by each herd, so as to distinguish it with anything like exactness, from that committed by the other herds; for these herds move from day to day from one section to another of the plaintiffs' lands, sometimes traveling separately and again commingled; and even could this be done, it would entail a large expense in keeping watch of so many bands of sheep in their passage across the lands of the plaintiff.

But the direct damages would be small as compared with the indirect and consequential damages, which though too remote to be recoverable at law would be none the less real. Thus it is alleged in the complaint that the plaintiffs maintain large herds of cattle upon the lands in question, that these lands are necssary to plaintiffs for that purpose; "that they have no other lands on which they can graze and pasture said cattle, nor any portion of them, nor any means whereby they can keep or maintain said cattle, except by pasturing them on said lands, and that said lands are of no value to plaintiffs except for pasturage for said cattle"

The continuous intrusion of vast herds of sheep, would result in the expulsion of plaintiffs' cattle from their lands, and the consequence to plaintiffs would be the destruction of credit, loss of trade, the ruin of business, and the failure of

business prospects; damages for which compensation could not be awarded at law. In such a case, the remedy at law being inadequate, equity has jurisdiction to prevent the injury by injunction.

"If the remedy at law is sufficient," say the Supreme Court of the United States, "equity cannot give relief, but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity."

Watson vs. Sutherland, 5 Wall., 74.

The facts in the above case were these: Watson & Co., appellants in the suit, having issued writs of *fieri facias* on certain judgments which they had recovered in the Circuit Court for the District fo Maryland, against Wroth & Fullerton, caused them to be levied on the entire stock in trade of a retail dry goods store in Baltimore in the possession of Sutherland, the appellee. Sutherland claiming the exclusive ownership of the property, and insisting that Wroth & Fullerton had no interest whatever in it, filed a bill in equity to enjoin the further prosecution of the writs, and so to prevent, as he alleged, irreparable injury to himself. The grounds on which the bill charged that the injury would be irreparable, and could not be compensated in damages, were these: That he was the *bona fide* owner of the stock of goods which were valuable and purchased for the business of the current season, and not all paid for; that his only means of payment were through his sales; that he was a young man recently engaged on his own account in merchandizing, and had succeeded in establishing a profitable trade, and if his store were closed, or his goods taken from him, or their sale long delayed, he would not only be rendered insolvent, but his credit destroyed, his business broken up, and his prospects in life blasted. The answer set forth that the goods levied on were really the property of Wroth & Fullerton, insolvent debtors, who had fraudulently transferred them to Fullerton, without consideration, and in order to hinder and defeat their creditors. It added that there was no reason to suppose that the levy would work

irreparable injury to Sutherland, even if the goods were his property, as other property of the same description could easily be obtained in the market, and that a jury would have ample power, on a trial at common law in an action against the appellants, or against the marshal to give a verdict commensurate with any damages the appellee could sustain by the levy and sale.

Counsel for appellant contended that while equity in certain cases would interfere to prevent the sale of personal property, or compel its delivery, yet such cases must have some peculiarity in the character of the property; as in the examples given by Storey, 1 Equity, Jur., Sec. 709; an old altar piece made of silver, and remarkable for a Greek inscription and dedication to Hercules; and so of a horn by the tenure of which an estate is held; and so of any chattel, the principal value of which consists in its antiquity, or its being the production of some distinguished artist, or in its being a family relic, ornament or heirloom. But it was contended that the same principle would not apply to ordinary muslins, flannels and other items, the common stock of a retail dry goods shop; that the books are full of cases brought at law against sheriffs, (and here there was no allegation of insolvency against the officer) for taking the goods of a stranger on execution, and they show that ample damages are recoverable, according to the circumstances of each case.

In deciding the case, the Supreme Court said, "It is contended that the injunction should have been refused, because there was a complete remedy at law." Then, after using the language above quoted, the Court further said: "How could Sutherland be compensated at law for the injuries he would suffer, should the grievances of which he complains be consumated."

"Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by the trespass. Loss of trade, destruction of credit, and failure of business prospects are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law. Commercial ruin to Sutherland

might therefore be the effect of closing his store and selling his goods, and yet the common law fails to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in *limine*, brings the parties before it, hears their allegation and proofs, and decrees, either that the proceedings be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed by the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued."

See also Boyce's Executors vs. Grundy, 3 Peters, 210.

In a recent case in New York, the question was as to the ownership of a portion of the ocean beach at Far Rockaway, Long Island. The plaintiff filed his bill in equity setting up title, and alleging that plaintiff was the owner of a hotel on his premises, resorted to by visitors for surf bathing and sea air which required undisputed control of the beach in question, and prevented the exclusion of intruders by any substantial barriers; the beach he had leased to tenants, who maintained bathing houses thereon. That the defendants claiming under an adverse title, had made repeated efforts to take possession of the beach, and threatened to oust plaintiff and his tenants, thus impairing the rental value of the property and occasioning serious damage; that defendants were irresponsible pecuniarily. The judgment demanded was that defendants asserted title be declared void and they restrained from taking or attempting to take possession of said beach lands.

It was objected by defendants that the cause of action was simple trespass, for which the remedy at law was adequate and complete, and that to take it from the common law courts was in violation of the Constitution.

On this point the court said, "The circumstances of the case are peculiar, and we think within the established principle entitle the plaintiff to the relief songht. He was the owner of a hotel upon the ocean beach, greatly resorted to by

visitors in the summer for the benefit of surf bathing and sea air, and which could be enjoyed by them advantageously only by the undisputed control of the beach in question, by the owner of the hotel. The use and character of the property was such that intruders thereon could not be excluded by substantial barriers, and a remedy against them by an action of trespass, would necessarily be of doubtful success, and probably afford an inadequate indemnity for the injuries inflicted. During a long period of time successive efforts have been made by the defendant and his lessors to obtain possession of the premises in dispute, and occupy them to the exclusion of the plaintiff. Actions have been threatened and claims of title made, which constitute a serious annoyance to the owner, and impairment of his ability to derive adequate compensation for the use and rental of such property. The defendant Norton transferred an interest in his lease to the other defendant Levy, in order to multiply the claimants to the beach, and the prospect of successive litigations in connection therewith. These annoyances have continued for a series of years and occasioned damage to the plaintiff's rights of property, which could not be easily ascertained or adequately compensated in an action at law. The evidence also tended to show that the defendant Levy was a person of little pecuniary responsibility, and presumably unable to respond in damages for the injury his conduct was likely to inflict on the plaintiff's rights. Under similar circumstances the jurisdiction of a court of equity to interfere by injunction to quiet the title, and prevent an injury for which no adequate remedy exists at law, has been frequently exercised and approved by the courts.

Mubry vs. Norton, 100 N. Y., 424.

The Supreme Court of Maryland holds: That a court of equity has jurisdiction at the instance of a purchaser at a mortgage foreclosure sale of land. on which a canning factory is situated, to restrain a party to whom the mortgager of the land has executed a subsequent chattel mortgage from selling the machinery on the premises covered by the mortgage during the canning season, when the sale would destroy the busi-

ness conducted therein, as the owner would have no adequate remedy at law.

Dudley vs. Hurst, (M. D.) 8 Atl. Rep. 901 (Am. Deg. No. 5, May, 1887, p. 97, Sec. 2.)

"Equitable jurisdiction," says the Supreme Court of Pennsylvania, "does not depend on the want of a common law remedy, for while there may be such a remedy, it may be inadequate to meet all the requirements of the given case, or to effect complete justice between the contending parties. Hence the exercise of chancery powers must often depend on the sound discretion of the court.

Appeal of Brush Electric Co. (Pa.) 7 Atl. Rep., 794, (Am Dig. No. 3, March, 1887, p. 65, Sec. 3.)

"If a trespass to property is a single act, and is temporary in its nature and effects," says Mr. Pomeroy, "so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The principle determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows:

1—If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable, that is, if the injury done or threatened, is of such a nature, that when accomplished, the property cannot be restored to its original condition, or cannot be replaced by means of compensation in money, then the wrong will be prevented or stopped by injunction.

2.—If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act, if it stood alone, then also the entire wrong will be prevented by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy. The legal remedy is not adequate, simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, by one action at law, recover damages which constitute a complete and cer-

tain relief for the whole wrong—a relief virtually as efficient as that given by a court of equity. This conclusion is sustained by the consensus of modern decisions of the highest authority, although it cannot be claimed that the cases are unanimous in its acceptance. All the cases, English and American, have professed to adopt the inadequacy of legal remedies as the test and limit of the injunctive jurisdiction; but in applying this criterion, the modern decisions. with some exceptions among the American authorities, have certainly held the injury to be irreparable and the legal remedy inadequate in many instances, and under many circumstances where Chancellor Kent would probably have refused to interfere. It is certain that many trespasses are now enjoined, which, if committed, would fall far short of destroying the property, or of rendering its restoration to its original condition impossible. The injunction is granted not merely because the injury is essentially destructive, but because being continued or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages. While the same formula is employed by the courts of equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged; judges have been brought to see and to acknowledge, contrary to the opinion held by Chancellor Kent, that the common law theory, of not interfering with persons until they shall have actually committed a wrong, is fundamentally erroneous; and that a remedy which prevents a threatened wrong, is in its essential nature better than the remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice, wouid be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed."

3 Pom. Eq. Jur., Sec. 1357 and Note 1.
See also Sullivan vs. Finnigan, 101 Mass., 447.
Clouston vs. Shearer, 99 Mass., 209.
Gage vs. Rohrbach, 56 Ill., 262, 266.
McDonnell vs. Langdon, 3 Gray, 513.
Buxton vs. Broadway, 45 Conn., 540.

Ferguson vs. Fisk, 28 Conn., 501.
Gage vs. Billings, 56 Ill., 268.

2.—Again, the bill is maintainable on the jurisdictional ground of avoiding a multiplicity of suits. The only redress at law would be the bringing of separate and repeated actions of trespass against each of the numerous defendants. The necessity for such a multiplicity of suits shows that the legal remedies are inadequate and cannot meet the ends of justice, and in such cases equity intervenes, and although the primary rights and interests of the parties are legal in their nature, it takes cognizance of them, and awards some specific equitable remedy, which gives in one proceeding more substantial relief than could be obtained in numerous actions at law.

This ground of equity jurisdiction has been exhaustively discussed by Mr. Pomeroy.

1 Pom. Eq. Jur., Secs. 243, 282.

The possible conditions in which a multiplicity of suits can arise, and thus furnish a source or occasion of equity jurisdiction are arranged by Mr. Pomeroy in four classes.

1.—Where the same injured party is obliged to bring a number of actions against the same wrong-doer.

2.—Where the dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions against A, all depending on the same legal questions and similar issues of fact, as repeated actions of ejectment to recover the same tract of land.

3.—Where a number of persons have separate and individual claims and rights of action against the same party A, all of which arise from some common cause, are governed by the same legal rule and involve the same facts.

4.—Where the same party A has some common right against a number of persons, the establishment of which would regularly require a separate action against each of those persons, or brought by them against him, and instead thereof he might procure the whole to be determined in one suit, brought by himself against all the adverse claimants as co-defendants. The case at bar is obviously embraced within the fourth class.

As to the third and fourth classes which really rest upon the same principle, Mr. Pomeroy shows that originally the Court of Chancery confined its jurisdiction to what was technically known as "bills of peace," and it was esential in order to obtain relief in equity on the ground of preventing multiplicity of suits, that there should exist among the individuals composing the numerous body, or between each of them and their single adversary, a common right, a community of interest in the subject matter, or a common title from which all their separate claims and all the questions at issue arise, and it was not enough that the claims of each individual being separate and distinct, there was a community of interest merely in the question of law or of fact involved, or in the kind and form of remedy demanded by or against each individual.

"But," says Mr. Pomeroy, "this theory has long been abandoned. The jurisdiction based upon the prevention of a multiplicity of suits has long been extended to other cases of the third and fourth classes, which are not technically 'bills of peace' but are 'analogous to' or 'within the principle of' such bills. Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title' or 'community of right,' or of 'interest in the subject matter,' among these individuals, *but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy* or in the kind and form of relief demanded and obtained by or against each individual of the numerous body. In a majority of the decided cases, this community of interest in the questions at issue and the kind of relief sought, has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful,

or illegal act or proceeding. Even this external feature of unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interferred and exercised this jurisdiction, where the individual claims were not only legally separate but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the questions at issue and in the remedy, and the single decree has, without any difficulty, settled the entire controversy and determined the separate rights and obligations of each individual claimant." And Mr. Pomeroy adds that, "while the foregoing conclusions are supported by the great weight of judicial authority, they are, in my opinion, no less clearly sustained by principle."

1 Pom. Eq. Jur., Sec. 268, 269.

In Woodruff vs. North Bloomfield Co., 8 Sawyer, 625, 636, above referred to, between which and this case there is a close and strong analogy, the court said, "I also think this bill maintainable against all the defendants on the jurisdictional ground of avoiding a multiplicity of suits. There is a common interest, a common, though not a joint right claimed, and the action on the part of all the defendants is the same in contributing to the common nuisance. The rights of all involve and depend upon identically the same questions, both of law and fact. It is one of the class of cases, like bills of peace, and bills founded on analogous principles where a single individual may bring a suit against numerous defendants, where there is no joint interest or title, but where the questions at issue, and the evidence to establish the rights of the parties and the relief demanded are identical."

See also Schuyler Fraud Cases, 17 N. Y., 592.
Mayor of York vs. Pilkington, 1 Atk., 282.
Supervisors vs. Deyoe, 77 N. Y., 219.

In an action to restrain defendants, four in number, from floating saw logs in the waters of a stream running across plaintiff's land, it appeared that for thirty years the stream had been so used by a few persons, not over twelve in all, and generally not more than three or four persons so used it in one

year, and the user was only for about six days in any year, and in some years not more than three; the defendants threatened to float a large number of logs over plaintiff's land, using the stream and its banks for that purpose, and that they would do some damage to the banks and other lands of plaintiff, and would occupy the stream for several days; they claimed the right for themselves and the public to float the logs, and asserted that they would do so whenever they chose.

Objection being made to the jurisdiction in equity, the Court of Appeals of New York said that it "is abundantly settled by authority that upon such facts the plaintiff may maintain an equitable action to quiet his title and settle his rights and prevent the threatened injury." "This is not a case," said the Court, "where the defendants threatened only to commit a single trespass, but they threatened to commit and claimed the right to repeat the trespass every year. Here a preventive action was proper to prevent an irreparable injury within the meaning of the equitable rule, and also to avoid a multiplicity of suits."

The Court further said: "The defendants were properly united. They claimed a common right hostile to the plaintiff. They asserted a public right common to many. In such a case all the parties asserting the common right may be united as defendants in an action by one who seeks to overthrow the common claim and establish his rights against all claimants."

Meyer vs. Phillips, 97 New York 485.

III.

Having considered the jurisdictional questions involved in the case, we come now to an examination of the case upon its merits; and here the strong analogy between the facts in this case and those of the "Mining Debris Case," 9 Sawyer, 441, comes out in strong relief, and it will be found, we think, that almost every ground that can be urged in favor of the defendants here, has been already raised, considered and overruled in the opinion of the Court in that celebrated case. For example, in that case it was strenuously contended by the counsel for defendants that the acts complained of, the filling

up of the beds of navigable rivers and the deposit of mining debris upon the agricultural lands along their banks were in fact not unlawful acts; that both Congress and the Legislature of California had authorized the use of the navigable waters of the streams in question for the flow of tailings and debris, and by necessary consequenee had authorized the unavoidable results of that use, the deposits in the beds of the rivers and upon the adjacent lands Not that Congress or the legislature had expressly provided that the rivers might be so used, but the authority was sought to be inferred from legislation recognizing mining as a proper and lawful employment, and encouraging it, knowing that it must be followed by the consequences complained of.

And so it may be argued in the case at bar that the growing and maintaining of sheep is a legitimate industry; important to public as well as private interests; an industry which is and should be encouraged and promoted; a species of property recognized by legislation; a business which has grown up to great dimensions in the west under the eyes of both the local and general governments; a business impossible to prosecute in such a country without the right or privilege of grazing upon the public lands, and hence that such a license from the Government is to be inferred from the knowledge and acquiescence of Congress as to the manner in which it has been conducted for many years; that under the actual circumstances of this case it has been and is impossible to exercise this license to graze upon the even numbered sections of public land without passing over, and, grazing upon the adjacent unfenced odd numbered sections which now compose the private property of the plaintiffs and since this is an inevitable consequence of the exercise of the right or privilege to graze, it is to be considered as also authorized by law or permitted by the government, and that the plaintiffs must be considered as having taken title to their lands from the government subject to this burden.

In the "Mining Debris Case," the Court said on this point: "It is not the general practice of legislative bodies in this country, where their powers are limited, to provide that in the exercise of rights provided for no injury shall be done to the

property of others. It is one of the conditions always implied by the law, that one's rights whether granted or regulated by the legislature, shall be exercised with due regard to the rights of others—so exercised as not to injure another, and certainly no authority to encroach upon the vested rights of others can be inferred without being in express terms clearly authorized."

"Congress could in no way authorize any encroachment upon or injury to the property of other private parties, and it will not be presumed that it intended any such consequences where it has not manifested its intention in such express and explicit terms that it cannot be misunderstood."

9 Sawyer, 490, 491.

"As owners of the public lands, the United States like any other owner, could sell them in large or small quantities and convey a fee simple to their grantees, or could lease them, or reserve them from sale, or grant a limited estate subject to easements granted to others, or in case of mines might allow them to be worked free of charge, or upon payment of a royalty. They could do all this with respect to their own lands, held in the character of proprietor, merely as the public lands are held; but they could not grant lands, and in the grant or by statute, or otherwise, impose an easement for the benefit of their grantees upon lands already owned in fee by private parties, unincumbered by easements or conditions of any kind, or authorize any other trespass or injury to such other lands. They could only deal with their own as other landed proprietors deal with theirs."—p. 492.

It is to be borne in mind that prior to the Mining Debris decision, in 1884, Congress had expressly legislated with reference to mines upon the public domain, to-wit: by the acts of 1866, 1870 and 1872. The act of 1866 declared that the mineral lands are open to exploration and occupation by all citizens of the United States, subject to such regulations as may be prescribed by law, and to the local customs and rules of miners, so far as not in conflict with the laws of the United States. It also provided for the sale and patenting to miners of quartz lodes, with the right to follow the vein on its dip into

adjacent lands. It also recognized the equities as against the United States and other miners, of those who had acquired water and possessory rights on the public lands. "This act," says Judge Sawyer, p. 494, "but legalized what were before trespasses on the public lands, and made lawful, as between the occupants and the United States, that which before was unlawful." The laws of 1870 and 1872 further regulated the disposition of mining lands, and extended the sale to placer mines, imposing on lands sold easements of varions kinds, such as tunnel rights, water rights, etc. The Court held, however, that no inferences could be drawn from this legislation authorizing the commission of the acts complained of. But in the case at bar there is no express legislation by Congress permitting the grazing of herds upon the public lands. If not a trespass, it is at least but a privilege or license, temporary in character and revocable at the pleasure of the government, the existence of which rests upon inference from the silent acquiescence of Congress in such use of the public lands. It cannot, however, be reasonably contended that Congress, by such a privilege or license, could have intended to authorize a destructive trespass upon the lands of private parties, its own grantees, purchasers in fee for a valuable consideration, from the United States, whose patents contained no limitation or reservation of any such right in favor of any person whatever.

In the Mining Debris case, it was further urged in behalf of the defendants that Congress had legalized the use of the navigable waters of the State for the flow and deposit of mining debris, and assumed the responsibility of protecting the streams from injury therefrom, because in the River and Harbor bill of 1860 there was a provision directing the Secretary of War to cause such examinations and surveys to be made as may be necessary to devise a system of works to prevent further injury to the navigable waters of California from mining debris, together with an appropriation of $25,000 for the "improvement and protection of the navigable channels of the Sacramento and Feather rivers."

In reference to which position the Court held:

1—That no authority could be inferred from such legis-

lation to injure or destroy the navigable waters of the state. It was a mere attempt by Congress to remedy an acknowledged evil from which no authority could be inferred to commit the acts complained of.

2.—Neither could such interence be drawn from the failure of Congress expressly to prohibit such acts.

3.—Nor is there any authority vested in Congress to legalize such injuries.

The case at bar is much stronger in that no such legislation, nor anything analagous to it has ever been attempted, with reference to the right of pasturage upon the public lands.

It was further urged in the "Mining Debris Case" that the acts complained of had been legalized by various statutes enacted by the Legislature of California for the encouragement of mining. It was not claimed that any statute, in express terms, authorized miners to fill up the channels of the rivers with debris, or to bury or destroy the lands of riparian proprietors, but that the right to do so was to be inferred from such legislation; for example, a statute authorizing the right of eminent domain to be exercised "in behalf of the following public uses: roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, also outlets natural or otherwise for the flow, deposit or conduct of tailings or refuse matter of mines, also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matters from the mines," and further, an act providing and requiring "the State engineer to inquire into the relation which hydraulic mining bears to the navigation of the rivers and their carrying capacity; also into the question of the flow of debris from the mines into the water courses of the State; to ascertain the amount and value of lands and improvements covered up or injured by the deposit of debris from hydraulic mines, and to devise a plan for averting such injuries without interfering with the working of such mines."

But the court ruled:

1.—That nothing but the express authority of a statute could take away from the acts complained of, the character of a nuisance. That in the statute referred to, no such express

authority was to be found, nor could any be inferred therefrom. That while mining was an important industry, and the State might very properly take any lawful measures to encourage it, yet it must be so carried on as not to injure or destroy other industries or rights, also important.

2.—The State has no constitutional power to authorize the acts complained of, and that any statute designed to effect that object would be void; and this upon the ground of violating the Constitution of the United States, and of the State of California, providing that no person be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

It is quite unnecessary to say again that there is no legislation analogous to this, with reference to the grazing of sheep upon the public lands; no ground therefore for any similar contention by these defendants; and the successive positions urged in behalf of the defendants in the "Mining Debris Case" and overruled by the Court, are only mentioned here in order to show by comparison with that case, the greatly superior strength of the case at bar; for here there can be no pretense of excuse for the injuries complained of in any similar legislation, Congressional or Territorial; for none such exists. In a word the acts complained of constitute naked and continuous trespasses without excuse or justification—an aggravated nuisance destructive of the plaintiffs' rights and depriving them of the free and beneficial enjoyment of their property.

A license or privilege claimed to graze on the public lands, and this not by express grant, but by implication merely, derived from the silent acquiescence of the government; and thence by another implication—implication upon implication—it is sought to justify the acts complained of as necessarily resulting from the exercise of the implied license. But surely it is preposterous to suppose that the government could have intended (even had it possessed the power, which it clearly did not,) by its silent acquiesence or otherwise to authorize the defendants to injure and destroy the property of its own grantees; purchasers in good faith and for a valuable

consideration from the same government. Assuredly the presumptions are all the other way, and the supposed license, if any can be implied from the circumstances, must be held to have been taken with the reasonable limitation that it was to be so exercised as not to damage or injure or destroy the property of others; and especially of those who hold not by implied license, but by express grant from the government itself.

It is not pretended that any compensation has been paid by the defendants to the plaintiffs for the use of, or damage to these lands, the value of which for the purposes of the plaintiffs, is as effectually destroyed by the inroads of defendants' herds, as if they were buried under sand and mining debris; and "we do not think it necessary," says the Supreme Court of the United States, "to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the state within which it lies."

Pumpelly vs. Green Bay Company, 13 Wall., 181.
Eaton vs. B. C. & M. R. Co., 51 N. H., 510.
Cooley on Torts, 569.
Mining Debris Case, 9 Sawyer, 508.

But as the use for which these lands are taken by defendants is a private, and in no sense a public use, they could not be taken at all without the consent of the owners; "for there is no authority in the Constitution or laws of the country to compel one man unwillingly to surrender his property for the use of another, either with or without compensation."

9 Sawyer, 509.

It is said, however, in the opinion of the court below, that the inevitable consequence of granting the injunction prayed for would be not only to exclude the defendants from the plaintiff's lands, but to deprive them of the privilege of grazing their sheep upon the interjacent even numbered sections belonging to the public domain, and also to hand over to the plaintiffs the exclusive right of pasturage upon such

even numbered sections, and therefore in the exercise of a sound discretion the granting of the writ should be denied.

This assumption of the Court below is without facts to support it. The complaint shows: 1st, That this entire body of land is intersected by seven convenient and well known highways, by means of which defendants may traverse said lands with their herds; and 2d, that the public surveys have been extended over all these lands, and it follows therefrom that the section corners of all the lands embraced in the townships and fractional townships mentioned in the complaint are established and marked on the ground, and could be readily ascertained by the defendants. How, then, can it be said that the natural consequence of enjoining defendants from trespassing on plaintiffs' lands will be to exclude them from the even numbered sections? All that is necessary to enable the defendants, notwithstanding the injunction, to enjoy what they claim to be an implied right from the government to graze their sheep upon the public domain, is that they employ a sufficient number of herders to attend their flocks. By so doing they may readily so restrain their herds to the even numbered sections as to prevent them from grazing upon the lands of the plaintiffs. And surely there is nothing unreasonable in requiring the defendants so to use and enjoy such implied license, if any there be, as not to inflict injury on private proprietors. For the same reason that the injunction would not operate to exclude the defendants from the even numbered sections, it follows that it would not result in securing to the plaintiffs the exclusive use of the same.

Moreover, the plaintiffs only object to the grazing of these lands with sheep, and this for the reason that such use of the land by defendants is wholly incompatible with the only beneficial use to which plaintiffs can subject their own land, as shown by the allegations of the complaint. Other classes of stock, within reasonable limits, might graze thereon without working irreparable injury to the plaintiffs.

But if it were true that the consequences of the injunction were such as is assumed by the court below, it would seem to be no sufficient reason for refusing the writ, for the court should look to the comparative injury which would result to

the respective parties from the granting or refusal of the same. Now as to the defendants if the injunction should be granted, and it were true that they would thereby be excluded from the use of all these lands for the grazing of sheep, the injury, if any, to them would be comparatively slight, because it is a fact of which the court will take judicial cognizance that there are in Utah vast tracts of unoccupied public lands, upon which defendants may pasture their sheep, without trespassing upon the lands of private proprietors. The granting of the injunction would scarcely put the defendants to inconvenience.

On the other hand, the refusal of the injunction would be disasterous to the plaintiffs, and they would have no means of protecting themselves against the threatened trespasses. They cannot fence their lands without rendering a great portion thereof valueless as shown by the complaint; neither can they do so without enclosing an equal portion of the public domain, to-wit: the very same even numbered sections on which the defendants claim the right to graze. We call special attention to this fact, for it will be readily perceived, by a simple consideration of the method adopted by the Government in its public surveys, that as it would be impossible for the plaintiffs to enclose the entire body of land in which their odd numbered sections are situated, without also enclosing the interjacent even numbered sections, so it would be also impossible for them to enclose their odd sections separately, and in detail, without also enclosing the same even sections. Were they to attempt so to enclose their lands, defendants and all others would be effectually excluded from the even numbered sections for any and all purposes. Moreover, such action on the part of plaintiffs would doubtless be held a violation of the Act of Congress.

Statutes of 1884-5, p. 321, approved, Feb. 25, 1885.

Neither is it possible for plaintiffs to protect themselves against the trespasses of defendants by purchasing from the government the title to the even numbered sections, for neither under the provisions of the pre-emption, homestead, nor desert acts could they acquire title to the same.

In conclusion we may say: that it appears from the allegations of the complaint, taken as confessed by the demurrer, that plaintiffs are using their own lands in a lawful manner, and and as they have a lawful right to do, and in connection therewith are carrying on an extensive business, in which they have invested a large fortune; that the defendants claim the right, and threaten to, and unless enjoined will, so interfere with plaintiffs' use of their own lands as to destroy plaintiffs' business and render their lands valueless to them. It is also alleged in the complaint and admitted by the demurrer, that it is not possible to estimate the loss and damage which plaintiffs will sustain if the threatened wrongs of defendants are permitted, and that there is therefore no adequate remedy at at law available to plaintiffs. It would be strange indeed if, in the light of these conceded facts, equity were powerless to enjoin the threatened injury.

Respectfully submitted,

M. KIRKPATRICK,

Attorney for Appellants.

Supreme Court U. S.
FILED,
DEC 16 1889
JAMES H. McKENNEY,
CLERK

No. 711.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1889.

M. B. BUFORD, ET. AL. — Appellants.

vs.

JOHN S. HOUTZ, ET. AL. — Appellees.

BRIEF OF APPELLEES.

JOSEPH L. RAWLINS,
OGDEN HILES,
Of Counsel.

JAMES N. KIMBALL,
Attorney for Appellees.

Filed.....1889.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

M. B. BUFORD, ET AL.,
Appellants.

vs.

JOHN S. HOUTZ, ET AL.,
Respondents.

} No.

BRIEF OF RESPONDENTS.

The general question which is presented by this record is, whether a private proprietor of unoccupied and uninclosed lands, which are contiguous to unoccupied and uninclosed lands belonging to the public domain of

the United States can maintain a bill to enjoin and restrain other persons from pasturing commonable cattle on such lands, when it appears upon the face of the bill of complaint that to grant the relief prayed for, will make the plaintiff an exclusive licensee for the pasturing of cattle over the whole of such lands. In other words, whether there is any equity in a bill of complaint which asks a court of equity to exclude every one but the plaintiff from pasturing commonable cattle on commonable lands in Utah Territory. The Appellants by this action in effect ask the Court to grant them such exclusive privilege, and their claim to such privilege is set out in, and appears upon the face of the complaint.

We do not ask this Court to consider the question presented by the demurrer, as to whether several causes of action are improperly united in the complaint; but we here ask judgment upon the merits of the controversy presented in the bill.

There is no Equity in the Bill of Appellants.

I

The complaint alleges that the lands of which the Appellants are the proprietors and in respect of which they ask an injunction against respondents, "comprise in all more than three hundred and fifty thousand (350,000 acres) and extend over an area of *forty miles* in a northerly and a southerly direction by about *thirty-six miles* in an easterly and westerly direction.

That said lands are very valuable for the pasturage and grazing of stock, and are of little or no value for

any other purpose, and were acquired and are now held by plaintiffs for the purposes aforesaid solely. That owing to the character of said lands, and the scarcity of water, and the aridity of the climate where said lands are situated they can never be subjected to any beneficial use other than the grazing of stock."

It will be observed that a tract of land which "extends over an area of forty miles in a northerly and southerly direction by about thirty-six miles in an easterly and westerly direction will embrace about fourteen hundred and forty (1440) square miles, or about *nine hundred and twenty one thousand* and six hundred 921,-600 acres of land, all of which is uninclosed and unoccupied except for grazing purposes."

Now this singular complaint proposes, that the Court shall by injunction compel owners of sheep to keep in certain designated highways when passing across the "odd numbered sections" embraced within the limits of the forty by thirty-six mile tract before mentioned, but it is not proposed to limit the plaintiffs privilege of pasturing cattle over any part of the whole tract, and this is supposed to be that "equality in which equity delights."

It would seem that no more need be said respecting this proposition than was said by the Supreme Court of Utah in its opinion in this case, which was, that "these lands were all originally Government lands. and are mostly so at the present time. The Government has tacitly given the public the privilege of pasturing on these lands, and the common practice is for the settlers to use them in common except where they may be fenced. When the Government has made a transfer of any such lands, and thereafter they were allowed to re-

main open as before the transfer the practice of using them as common pasturage has continued."

And again, "the granting of the injunction as prayed, would give the plaintiffs virtual use of their own lands, and also of all lands within this vast tract of forty by thirty-six miles."

See Transcript of Record, page 10.

Counsel for the appellants on page 5 of their Brief call the attention of the Court to the statute of Utah Territory Section 3 of Chapter 8, page 9 of Session Laws of 1886, which among other things provides that, "If any neat cattle horses, mules, sheep, goats or hogs shall, First—break through a lawful fence, or do damage within the enclosure or premises of any person in any County or portion thereof, where the inhabitants have declared or may hereafter declare, in favor of fencing their farms: Second—break through a lawful fence within an incorporated city or town, or any lawful fence enclosing any city lot, orchard, or stock yard, and do damage therein; Third—do damage upon the premises of any person, whether said premises are protected by a fence or not, the person aggrieved thereby may recover damages either by an action against the owner of the tresspassing animals, or by impounding them in the precinct pound" Section 4, of the same act then provides that the County Court, may call a general or special election for that purpose, that thereat the legal voters of a county may by a two thirds vote, declare in favor of fencing their farms.

Counsel say that Section 4 has no application to this case. That is admitted. But neither has section 3 any application here. If it has, the appellants would be out of Court so far as this proceeding is concerned, because if section 3 be applicable, then the appellants have not

only an adequate remedy, but also a specific remedy at law.

The act is entitled "An Act Providing for Impounding Animals and Prescribing the Regulations of Pounds and for Disposing of Estrays." No one has ever supposed that that statute provides for cases other than those of tresspassing animals on arable, cultivated lands, or farms.

The decision of this case by the Supreme Court of this Territory has gone quite apparently upon the ground that there is no equity in the Bill of Complaint because from the earliest times not only in this Territory but throughout the United States, commonable cattle have always been permitted to graze on uninclosed public lands, and as a general rule in cases where the Government has parted with its title to private proprietors, the general public has been permitted to graze commonable cattle on the lands till such time as the settler or private proprietor shall enclose his land with a fence.

Counsel for Appellants on page 6 of their brief, declare it to be "Unnecessary to cite Authorities to the proposition that at common law every unwarrantable entry on anothers land whether fenced or unfenced is a tresspass. The law bounds every man's property, and is his fence."

The common law of England has in general, been recognized as the rule of decision in American Courts in the absence of legislative enactments, so far as the same has been applicable to the conditions of American progress and development, but the Courts in America, have never adopted the narrow, not to say slavish adherence to English rule and precedent, which is implied in the language of appellants counsel on this subject.

Whatever may have been the doctrine and rule of the common law in England in respect of this proposition, it is certain that the rule which is impliedly stated in the Brief of appellants, is not the rule in the United States, and particularly in the western part of the Union.

The case of Kerwhacker vs. Cleveland, Columbus and Cincinnati R. R. Company, reported in 3d Ohio State Rep, p. 172 is very much in point here, the Court there decided upon full discussion and consideration, the very proposition which we have just stated.

In that case the contention was that "It is the duty of the owner of domestic animals to keep them on his own lands or within his own inclosures; and that if they wander from his own lands and get upon the uninclosed lands of his neighbors, they will be unlawfully there and the owner guilty of tresspass"

To this proposition the Courts say. "The doctrine that the owner of cattle, hogs, horses etc., is bound to keep them on his own lands, or within an inclosure, and that he becomes a wrong-doer if any of them escape or stray off upon the lands of another person although uninclosed, is said to be derived from the common law of England and to be in force in this state * * *

Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this state, and in accordance with their habits understandings and necessities. If this be the law in Ohio now it has been since the first settlement of the State and every person who has allowed stock to run at large and go upon the uninclosed grounds of others has been a wrong doer, and liable to an action for damages by every person

on whose lands his creatures may have wandered.

What has been the actual situation of affairs, and the habits, understandings and necessities of the people of this State from its first settlement up to the present period in this respect? Cattle, hogs, and other kinds of live stock not known to be breachy and unruly or dangerous, have been allowed at all times and in all parts of the State to run at large and graze on the range of uncultivated and uninclosed lands. * * *

The common understanding upon which the people of this State have acted since its first settlement has been that the owner of land was obliged to inclose it with a view to its cultivation; that without a lawful fence he could not as a general thing, maintain an action for a tresspass thereon by the cattle of his neighbor running at large; and that to leave uncultivated lands uninclosed was an implied license to cattle and stock at large to traverse and graze upon them. *Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances* and condition of the people of this State, but inconsistent with the habits, the interests, necessities, and understanding of the people."

That this alleged rule of the common law is inapplicable to the circumstances and conditions of the people of Utah Territory and inconsistent with their habits, interests and necessities, is impliedly recognized by the statute of this Territory before referred to, because by providing for the impounding of tresspassing animals on inclosed, and in certain cases on uninclosed cultivated lands, the legislature by necessary implication recognized the lawfulness of the custom under which animals have been permitted to graze generally, upon uninclosed and uncultivated lands. Moreover it is pro-

vided by statute in this territory, that, "All fence four and a half feet high, in good repair, consisting of rails, poles, boards, stone or other suitable material, and all fence of any description whatever which shall, in the judgment of two or more fence viewers be equal thereto shall be deemed a lawful fence, and all animals breaking over or through such lawful fence, shall be held liable in damages."

Sec. 2234 Compiled Laws of Utah of 1888.

Now if the owners of trespassing animals are liable in damages whether the injured party's lands are inclosed or not. to what purpose is this provision defining a lawful fence, and making the breaking thereof by tresspassing animals the ground for holding the owners of such animals liable in damages. This legislation is wholly inconsistent with the doctrine that it is *unlawful* for the owner of animals to allow them to run at large and that he is liable in damages in case they shall go upon the uninclosed grounds of another; and certainly if these several defendants in this case be not responsible in damages, for the assumed tresspasses of their sheep, then the appellants can not maintain this action.

As was said by the Ohio Court in the case just cited, so we may say in this case that this doctrine of the common law may be suitable to an old and highly cultivated country, where all the lands except the public highways and commons are under inclosure, but it has no suitable and proper application in Utah.

In the case of Seeley vs Peters 5, Gilman 130 the Supreme Court of Illinois held upon great consideration, the rule invoked by appellants in this case, to be inapplicable to the condition and circumstances of the people of Illinois, where they were similarly situated as in

Utah Territory. And to the same effect is the case of Stadwell vs. Ritch 14 Conn, 293.

On this feature of the case then, it seems clear that the appellants have no case; in other words that it is *not true*, in respect of the subject matter of this lawsuit, that "the law bounds every man's property, and is his fence" in the sense for which appellants contend in this case.

On this point we cite

Laws of the Territory of Utah, 1886, Page 8. Chapter 8.

Kerwhacker vs C. C. & C. R. R. Co. 3 Ohio St., 172.

Seely vs Peters 5 Gilman (Ill) 130.

Stadwell vs Ritch 14 Conn 293.

Town of Beaufort vs Danner 1 Strob 175.

Fripp vs Hasell 1 Strob 173.

Sec. 2234 Com. Laws of Utah 1888.

Comerford v Dupray et al 17 Cal. 308
Logan v Geddes et al 38 Cal 579

An examination of these cases, and a consideration of the principles on which they were decided, will as we confidently expect, result in a judgment by this Court, that the judgment of the Supreme Court of Utah in this case, is fully supported by reason and principle as well as by authority. * * *

Counsel for the appellants seem to rely greatly on the case of Woodruff vs Bloomfield Gravel Mining Company and others, reported in 9th Sawyer's Reports, which in California is commonly known as the "Mining Debris Case" 9th Sawyer 441, 18 Fed Rep 753.

We respectfully submit that that case does not seem

to us, to be applicable to this case in any single feature, The case as stated by the learned judge who wrote the leading opinion was a bill in equity to restrain the defendants, who were engaged in hydraulic or placer mining on the western slope of the Sierra Nevada Mountains, from discharging their mining debris and detritus into the affluents of Yuba river and into that river itself, whence it was carried down by the current into Feather and Sacramento rivers, filling up their channels and injuring their navigation; and some times by overflowing and covering the neighboring lands with debris, injuring and threatening to injure and destroy the lands and property of complainant and other property owners, situate on and adjacent to the banks of those water courses.

The complaint alleged also that the acts of the defendants constituted a public nuisance in that the vast quantities of detritus which defendants were washing into the Feather and Sacramento Rivers had so filled the channels of the latter streams as to greatly impair and to some extent destroy their navigability, and were within the definition of a public nuisance as it is defined by Section 3479 of the Civil Code of California, which reads that "Anything which is an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner of any navigable lake or river bay, stream, canal or basin, or any public park, square, street, or highway is a nuisance.

The complainant alleged further that this public nuisance was specially injurious to himself.

In answer to the complaint the defendants claimed

a right by prescription, a right by notorious adverse possession, a right under the customs of miners which was claimed to have been recognized by the legislation of California and of Congress.

All these positions were held to be untenable, and the case is, when reduced to its last analysis an application of the doctrine or maxim of *Sic utere tuo ut alienun non loedas.*

Clearly the maintenance of either a public or private nuisance is *ex vi termini* a violation of that maxim of the law. But that is not this case.

The respondents do not claim any implied license to graze on lands of the United States, growing out of any legislation on the subject, nor any imprescriptible right to graze on any of the lands described in the complaint growing out of any acquiescence of appellants in respect of the subject, but as before said they claim an equal right with appellants and the people generally to pasture commonable cattle on uncultivated uninclosed lands in Utah Territory.

The Court in the Mining Debris Case held that the acts of defendants constituted a public and private nuisance at common law, and that Equity would afford complainants relief independently of any statute of the State on the subject.

If the respondents should go upon the lands described in the complaint or any where within the tract of 36 by 40 miles mentioned therein and should maintain a nuisance injurious to appellants or to any one else equity would afford relief; but certainly the pasturing of cattle on lands which confessedly are useful for no other purpose, is not a public or private nuisance,therefore appellants do not bring themselves within the reason or prin-